

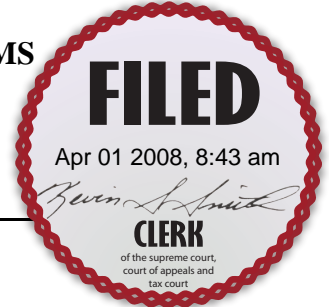
**Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

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**IN THE  
COURT OF APPEALS OF INDIANA**

THELMA RETZ,

Appellant-Intervenor,

and

ROBERT LEE, Allen County Treasurer, and  
THERESE BROWN, Allen County Auditor,

Plaintiffs,

VS.

SWAMI, INC.,

Appellee-Defendant.

[illegible]

No. 02A03-0706-CV-254

APPEAL FROM THE ALLEN CIRCUIT COURT  
The Honorable Thomas J. Ryan, Senior Judge  
Cause No. 02C01-0208-PL-109

**April 1, 2008**

**MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION**

**CRONE, Judge**

Swami, Inc., petitions for rehearing in *Retz v. Swami, Inc.*, No. 02A03-0706-CV-254 (Ind. Ct. App. Jan. 25, 2007), in which we reversed the trial court’s grant of Swami’s motion for relief from judgment. We grant Swami’s petition for the sole purpose of clarifying the basis for our decision but affirm our decision in all respects.

In our memorandum decision, we determined that Swami’s claim that the auditor failed to provide constitutionally adequate notice to Swami of a tax sale and issuance of the tax deed was available at the time of the underlying litigation, and therefore Swami was barred by the doctrine of res judicata from presenting this argument in its motion for relief from judgment. *Id.*, slip op. at 9-13.

To illustrate that Swami would not have been subject to sanctions for pursuing a claim challenging the constitutionality of the notice provided, we cited *Diversified Investments, LLC v. U.S. Bank, N.A.*, 838 N.E.2d 536 (Ind. Ct. App. 2005). There, U.S. Bank “challenge[d] the statutory notice procedures of Indiana Code sections 6-1.1-25-4.5 and –4.6<sup>[1]</sup> as constitutionally insufficient for the circumstances.” *Id.* at 542-43. In reviewing this issue, the *Diversified* court noted,

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct.

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<sup>1</sup> The tax sale process is governed by Indiana Code Sections 6-1.1-24-1 through -14 and 6-1.1-25-1 through -19. Indiana Code Section 6-1.1-24-4 requires, *inter alia*, the county auditor to send notice of the county’s application to obtain judgment and order for sale of real property to the last address of the property owner as indicated in the auditor’s records. Indiana Code Section 6-1.1-25-4.5 requires, *inter alia*, that notice of the tax sale be sent to the record owner’s last address. Indiana Code Section 6-1.1-25-4.6 requires, *inter alia*, that notice of the purchaser’s petition for issuance of tax deed be sent to the record owner’s last address.

652, 94 L. Ed. 865 (1950). “The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected ....” *Id.* at 315, 70 S. Ct. 652. The constitutional requirements are satisfied if these conditions are reasonably met with “*due regard for the practicalities and peculiarities of the case.*” *Id.* at 314-15, 70 S. Ct. 652.

*Id.* at 539-540 (emphases added).

The *Diversified* court found that the notice provided by the auditor satisfied constitutional due process requirements because the auditor could reasonably infer that the notices were properly delivered where the notices were not returned to the auditor as undeliverable and the return receipt postcards were returned with signatures. *Id.* at 543-44. Thus, the *Diversified* court concluded that “with regard for the ‘practicalities and peculiarities’ of the present facts, we cannot say the auditor failed to meet constitutional due process requirements by giving notice in a fashion not reasonably calculated to apprise U.S. Bank’s predecessor-in-interest of the pending tax sale proceedings.” *Id.* at 544 (quoting *Mullane*, 339 U.S. at 314).

Here, the circumstances are different from those in *Diversified*, so the fact that notice was found to satisfy constitutional due process in *Diversified* does not necessarily dictate the same result in this case.<sup>2</sup> More importantly, *Diversified* demonstrates that a claim challenging whether substantial compliance with Indiana’s tax sale notice

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<sup>2</sup> Likewise, we acknowledge that the circumstances here are different from those in *McBain v. Hamilton County*, 744 N.E.2d 984 (Ind. Ct. App. 2001). In citing that case, we did not mean to suggest that Swami could have made the exact same argument as the McBains. Instead, we cited it as an example in which the assessment of the “practicalities and peculiarities” of the case led the court to conclude that the notice provided was constitutionally inadequate.

requirements satisfied due process was available because tax sale procedural due process claims are reviewed on a case-by-case basis. Thus, Swami had the opportunity to argue that the auditor's notice was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

Any modification in the law resulting from the decision in *Jones v. Flowers*, 547 U.S. 220 (2006), cannot alter the fact that Swami had the opportunity to present constitutional claims regarding the auditor's provision of notice in the underlying litigation. See *Bd. of Comm'rs of Adams County v. State ex rel. Gibson*, 226 Ind. 633, 638, 82 N.E.2d 891, 892 (1948) ("The fact that the statute upon which the trial court based its first finding and judgment was afterward declared unconstitutional in a different action between other and different parties could in no way affect the force or conclusiveness of the judgment in that first case."). Simply put, Swami had an opportunity to present a claim that the auditor's notice failed to comply with constitutional due process in the underlying litigation and chose not to pursue that line of argument; Swami may not take a second bite at the apple. We affirm our original decision in all respects.

DARDEN, J., and MAY, J., concur.